

5. However, as Plaintiffs repeatedly reminded AGO, and set forth in briefing in this Court, there is no such automatic stay of discovery based upon motions practice. As such, AGO had no lawful basis to refuse to appear (or to advise its client not to appear), at the October 4, 2017 deposition.
6. VCRP Rule 37(a)(4) provides that when a motion to compel is granted, a court may “require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney’s fees.”
7. VCRP Rule 26(c) governs protective orders, such as the motion to quash that Sorrell filed in this matter. It states that “if the motion for a protective order is denied in whole or in part... the provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.”
8. Plaintiffs incurred great costs responding to Sorrell’s Motion to Quash and appearing for a properly-noticed deposition that Sorrell failed to attend without excuse. These costs are itemized for Attorney Matthew Hardin in paragraph 9, below, and for Attorney Brady Toensing in paragraph 10. The costs are totaled in paragraph 11.
9. Matthew Hardin incurred the following costs in responding to the Motion to Quash and for the October 4 deposition:
 - a) Research & Drafting Plaintiffs’ Motion and Memorandum of Law: \$1290 (4.3 hours @ \$300/hr).
 - b) Review of correspondence/ confer with Atty. Toensing re: Oct 4 deposition: \$120 (0.4 hours @ \$300/hr).
 - c) Hotel for the night of October 3, 2017 in Williston, VT: \$224.57

d) Meals for Oct. 3 and 4: \$56.41

e) Mileage to/from Williston, VT and Richmond, VA: \$674.85

(1261.4 miles @ 53.5 cents per mile).

f) Tolls: \$50.45

g) Time spent at no-show deposition: \$150 (0.5 hrs @ \$300/hr).

h) Time spent preparing the instant Motion for Costs: \$180 (0.6 hrs @ \$300/hr).

Mr. Hardin voluntarily waives his normal hourly billing for time spent in transit to and from Williston, Vermont.

10. Attorney Brady Toensing incurred the following costs in responding to the Motion to Quash and attending the October 4, 2017 deposition:

a) Prepare letter to AAG David Boyd re Sorrell deposition / Telecons with Atty Hardin re same and opposition to Motion to Compel/ Research rules re same / RW documents re same: \$406.25 (1.25 hrs at \$325/hr).

b) Review and Revise Opposition to Motion to Quash and Cross Motion to Compel / Telecons with Atty Hardin re same / Finalize Same: \$568.75 (1.75 hrs at \$325/hr).

c) Prepare letter to AAG Boyd re Sorrell deposition: \$162.50 (0.5 hrs at \$325/hr)

d) Prepare email to AAG Boyd in response to voicemail re Sorrell deposition. \$81.25 (0.25 hrs at \$325/hr)

e) Attend Sorrell deposition / Travel to and from same. \$487.50 (1.5 hrs at \$325/hr)

f) Time spent researching and finalizing instant Motion for Costs. \$243.75 (0.75 hrs at \$325/hr)

g) Court Reporter fee: \$90.00

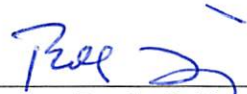
11. Total costs requested because related to the Opposition to Motion to Quash and Cross Motion to Compel and attendance at deposition where Sorrell failed to appear without excuse: \$4,786.28

Wherefore, Plaintiffs request entry of an order requiring Sorrell and/or his counsel to reimburse the Plaintiffs in the amount of \$4,786.28.

Dated at Charlotte, Vermont this 25th day of October 2017.

**Energy & Environmental Legal Institute
Free Market Environmental Law Clinic**

By: _____



Brady C. Toensing
diGenova & Toensing
1776 K Street, NW, Suite 737
Washington, DC 20006
(202) 289-7701 / Brady@digtoe.com

Matthew D. Hardin
Attorney for Plaintiffs, *Pro Hac Vice*
314 West Grace Street, Suite 308
Richmond, VA 23220
(804) 608-6456 / MatthewDHardin@gmail.com

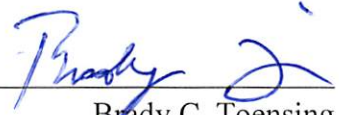
Certificate of Service

I hereby certify that on this 25th day of October 2017, I served this pleading by First Class Mail to the following:

William E. Griffin
Chief Assistant Attorney General
David Boyd
Assistant Attorney General
Office of the Vermont Attorney General
109 State Street
Montpelier Vermont 05609-1001

Dated at Charlotte, Vermont this 25th day of October 2017.

By: _____



Brady C. Toensing
diGenova & Toensing
1776 K Street, NW, Suite 737
Washington, DC 20006
(202) 289-7701 / Brady@digtoe.com

Exhibit A

STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
Docket No.: 349-6-16 Wncv

ENERGY & ENVIRONMENT LEGAL)
INSTITUTE, et al.)
Plaintiff,)
)
vs.)
)
THE ATTORNEY GENERAL OF VERMONT,)
et al.,)
Defendants.)

 ORIGINAL

DEPOSITION OF WILLIAM H. SORRELL
taken on October 4, 2017, at 10:00 a.m.,
at the offices of Jason R. Tiballi,
Williston, Vermont.

APPEARANCES:

BRADY TOENSING, ESQ., of the firm of diGenova &
Toensing, 1776 K Street, NW, Suite 737,
Washington, D.C., 20006,
(AND)
MATTHEW D. HARDIN, ESQ., 314 W. Grace, #308,
Richmond, VA, 23220, on behalf of the plaintiff.

Reported by: Christina L. Boerner, RPR

DEPOS UNLIMITED
P.O. BOX 4595
BURLINGTON, VERMONT 05406
802-658-1188
depos2@gmavt.net

I N D E X

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WITNESS

PAGE

William H. Sorrell

EXHIBITS

No.

Page

1 - 9/15/17 Notice of Deposition

2 - 10/2/17 letter sent via email; Toensing
to Boyd

1
2 MR. HARDIN: We will just go on the
3 record. This is Matthew Hardin; Brady
4 Toensing is also here with me. We are
5 here pursuant to a Notice of Deposition
6 that was sent to William Sorrell's
7 counsel on September 15th. I will make
8 that Notice of Deposition Exhibit 1.

9 We confirmed by letter on October
10 2nd that we expected to see Mr. Sorrell
11 here; I will make that letter Exhibit 2;
12 and there has been subsequent
13 correspondence.

14 We expected Mr. Sorrell to be
15 here; especially disappointing that he
16 is not here. We anticipated questioning
17 him about his use of various devices in
18 creation of government records and where
19 those records would be presently,
20 whether they would be in his personal
21 custody or in the custody of the
22 Attorney General's Office.

23 It's especially disappointing he
24 chose not to show and answer those
25 questions, so we will conclude the

deposition now.

(10:20 a.m., deposition closed.)

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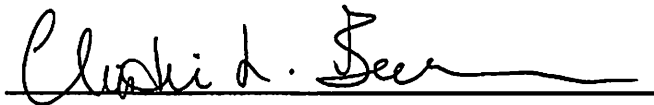
C E R T I F I C A T E

STATE OF VERMONT
COUNTY OF CHITTENDEN

I, CHRISTINA L. BOERNER, Court
Reporter and Notary Public, certify that I was
authorized to and did stenographically report the
scheduled deposition of WILLIAM H. SORRELL; and
that the transcript is a true and complete record
of my stenographic notes.

I further certify that I am not a
relative, employee, or counsel of any of the
parties, nor am I a relative or employee of any of
the parties' attorney or counsel connected with
the action, nor am I financially interested in the
action.

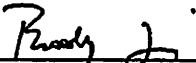
DATED this 4th day of October,
2017.



Christina L. Boerner, RPR

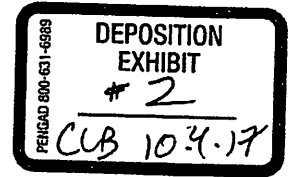
Respectfully submitted this the 15th day of September 2017.

**Energy & Environmental Legal Institute and
Free Market Environmental Law Clinic**

By: 
Brady C. Toensing
diGenova & Toensing
Attorney for Plaintiff
1776 K Street, NW
Suite 737
Washington, DC 20006
(202) 289-7701
Brady@digtoe.com

Matthew D. Hardin
Attorney for Plaintiff, *Pro Hac Vice*
314 West Grace Street, Suite 308
Richmond, VA 23220
(804) 608-6456
MatthewDHardin@gmail.com

diGENOVA & TOENSING, LLP
ATTORNEYS-AT-LAW



October 2, 2017

Via Email (david.boyd@vermont.gov)

David Boyd
Assistant Attorney General
Office of the Vermont Attorney General
109 State Street
Montpelier, Vermont 05609-1001

Re: Case No. 349-6-16 Wncv: October 4, 2017 Deposition of Former-Attorney General William Sorrell

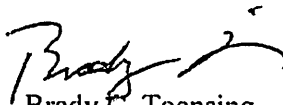
Dear David:

We have no word yet from the Court regarding your Motion to Quash the September 15, 2017 Notice of Deposition for your client, former-Attorney General William Sorrell. That notice obligates your client to appear for a deposition on Wednesday, October 4, 2017 at 10:00 a.m.

As we set forth in our Opposition to your Motion to Quash, there is no such thing as an automatic stay of discovery. Your client is not entitled to refuse discovery on the sole basis of a pending motion and absent a ruling from the Court he is obligated to appear for the properly noticed deposition.

A court reporter has been arranged and, absent a court order to the contrary, we plan on seeing General Sorrell on October 4 per the notice of deposition.

Sincerely,


Brady C. Toensing

cc: William E. Griffin, Chief Asst Atty General (*Via Email*)
Matthew D. Hardin, Counsel to EELI and FMELC (*Via Email*)

Exhibit B



diGENOVA & TOENSING, LLP
ATTORNEYS-AT-LAW

September 26, 2017

*Via Email (david.boyd@vermont.gov) and
First Class Mail*

David Boyd
Assistant Attorney General
Office of the Vermont Attorney General
109 State Street
Montpelier, Vermont 05609-1001

Re: October 4, 2017 Deposition of Former-Attorney General William Sorrell

Dear David:

Per our discussion yesterday afternoon, I spoke to my co-counsel, Matthew D. Hardin, and we do not see any basis in Vermont law for former-Attorney General William Sorrell to refuse discovery. The Vermont Supreme Court has ruled that there is a right to discovery in PRA cases. *Gendreau v. Gorczyk, et al.*, 161 Vt. 595 (1993) (PRA complaints “are civil actions in which the plaintiff is entitled to discovery and the full application of the civil rules”) (citing *Finberg v. Murname*, 159 Vt. 431, 434 (1992)). There is no basis to treat Mr. Sorrell any differently whether he is a party deponent or a mere witness (except for a few procedural differences involved in securing his presence). In either event, we are entitled to discovery and the full application of the civil rules.

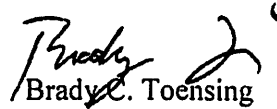
We sent a proper Notice of Deposition as contemplated by VCRP 37 (d). “If a party or an officer, director, or managing agent of a party... fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice... the court in which the action is pending on motion may make such orders in regard to the failure as are just.” Such orders expressly include deeming matters admitted, striking pleadings, and awards of costs.

Should General Sorrell seek a protective order and be denied in whole or in part, Rule 37 (a)(4) provides for an award of fees against him. Similarly, if we are forced to seek an order to compel, we will also seek an award of fees against him.

David Boyd
September 26, 2017
Page 2

Per the Deposition Notice, which was served by hand on September 15, 2017, we expect to see General Sorrell next Wednesday, October 4, 2017 at 10:00 a.m. We will be there.

Sincerely,


Brady C. Toensing

cc: William E. Griffin, Chief Asst Atty General (*Via Email*)
Matthew D. Hardin, Counsel to EELI and FMELC (*Via Email*)



diGENOVA & TOENSING, LLP
ATTORNEYS-AT-LAW

October 2, 2017

Via Email (david.boyd@vermont.gov)

David Boyd
Assistant Attorney General
Office of the Vermont Attorney General
109 State Street
Montpelier, Vermont 05609-1001

Re: Case No. 349-6-16 Wncv: October 4, 2017 Deposition of Former-Attorney General William Sorrell

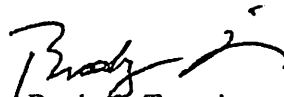
Dear David:

We have no word yet from the Court regarding your Motion to Quash the September 15, 2017 Notice of Deposition for your client, former-Attorney General William Sorrell. That notice obligates your client to appear for a deposition on Wednesday, October 4, 2017 at 10:00 a.m.

As we set forth in our Opposition to your Motion to Quash, there is no such thing as an automatic stay of discovery. Your client is not entitled to refuse discovery on the sole basis of a pending motion and absent a ruling from the Court he is obligated to appear for the properly noticed deposition.

A court reporter has been arranged and, absent a court order to the contrary, we plan on seeing General Sorrell on October 4 per the notice of deposition.

Sincerely,



Brady C. Toensing

cc: William E. Griffin, Chief Asst Atty General (*Via Email*)
Matthew D. Hardin, Counsel to EELI and FMELC (*Via Email*)



Brady Toensing <toensing@gmail.com>

EELI Case No. 349-6-16: Sorrell Deposition

1 message

Brady Toensing <brady@digtoe.com>

Tue, Oct 3, 2017 at 1:09 PM

To: David.Boyd@vermont.gov

Cc: Matt Hardin <matthewdhardin@gmail.com>, "Griffin, Bill" <bill.griffin@vermont.gov>

Dear David – This email responds to your voicemail from 12:10 p.m. today in which you said that you do not intend to appear with your client, William Sorrell, at tomorrow's deposition, which was noticed on September 15, 2017 in compliance with Vermont's Rules of Civil Procedure.

Our legal position is supported and remains the same. The filing of a Motion to Quash without a court order granting that motion does not excuse you from your obligation to comply with the rules of civil procedure. Warning us that you do not intend to comply with those rules is also not a valid excuse. Your position is weaker still in light of the Court's recent ruling granting joinder of your client.

Arrangements have been made. My co-counsel is already on his way. A court reporter has been scheduled. If there is no court order granting your Motion to Quash, we will be there and expect to see your client there. And if General Sorrell does not show-up, we will be seeking costs.

Sincerely, Brady.

* * * * *

Brady C. Toensing
diGenova & Toensing
1776 K Street NW
Washington DC 20006
(o) 202.289.7701
(m) 202.297.4245

Exhibit C

STATE OF VERMONT

SUPERIOR COURT
Washington Unit

W
2017 OCT -4 P 12: 54 CIVIL DIVISION
Docket No. 349-6-16 Wncv

Energy & Environment Legal Institute and
Free Market Environmental Law Clinic,
Plaintiffs

FILED

v.

The Attorney General of Vermont and
William Sorrell,
Defendants

ENTRY

Mr. Sorrell's Motion to Dismiss, MPR 13
Mr. Sorrell's Motion to Quash, MPR 14
Plaintiff's Motion to Compel, MPR 15

Over the AG's objection, the court allowed Plaintiffs to join former Attorney General William Sorrell as a defendant in this public records case. They seek to determine whether he possesses in his personal e-mail account any public records responsive to their request to the Office of the Attorney General. After amending their complaint, Plaintiffs promptly sought to depose Mr. Sorrell. Mr. Sorrell then filed a Rule 12(b)(6) motion to dismiss the complaint as far as it applies to him and a motion for a protective order quashing the deposition notice. Plaintiffs oppose dismissal and seek an order compelling Mr. Sorrell's deposition.

Mr. Sorrell argues that the complaint against him should be dismissed because the only proper defendant in a Vermont Public Records Act case is the governmental agency that fielded the request and he is an individual former State employee, not an agency.¹ He also argues that the court should adopt a rebuttable presumption against searching any State employee's private e-mail account absent some showing that public records in fact will be found there. He argues that the complaint lacks adequate allegations sufficient to overcome such a presumption for pleading purposes. Mr. Sorrell resists compliance with Plaintiffs' discovery demands largely because he believes he should not be a party in this case at all.

The court declines to rule on the substantive legal issues presented by Mr. Sorrell at this time. The Vermont Supreme Court has been clear that the pleading standard in Vermont is exceptionally minimal. See *Bock v. Gold*, 2008 VT 81, ¶ 4, 184 Vt. 575 ("the threshold a

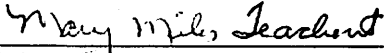
¹ But cf. *Prison Legal News v. Corrections Corp. of America*, No. 332-5-13 Wncv, 2014 WL 2565746 (Vt. Super. Ct. Jan. 10, 2014) (extending the Act to private entities operating as the functional equivalent of governmental agencies); *Whitaker v. Vermont Information Technology Leaders, Inc.*, No. 781-12-15 Wncv, 2016 WL 8260068 (Vt. Super. Ct. Oct. 28, 2016) (same).

plaintiff must cross in order to meet our notice-pleading standard is ‘exceedingly low’”); *Colby v. Umbrella, Inc.*, 2008 VT 20, ¶ 13, 184 Vt. 1 (“The complaint is a bare bones statement that merely provides the defendant with notice of the claims against it.”). Plaintiffs’ claims against Mr. Sorrell are novel and address complicated issues in a developing area of the law with competing policy interests and no binding precedent with any useful specificity.² Such claims are better “explored in the light of facts as developed by the evidence.” *Alger v. Dep’t of Labor & Indus.*, 2006 VT 115, ¶ 12, 181 Vt. 309.

Discovery may proceed to develop those facts.

Accordingly, Mr. Sorrell’s motions to dismiss and to quash are denied. Plaintiffs’ motion to compel is granted.

Dated at Montpelier, Vermont this 4th day of October 2017.



Mary Mijes Teachout
Superior Judge

² The court is aware that the Chittenden Civil Division has ruled on closely related issues in *Toensing v. The Attorney General of Vermont*, No. 500-6-16 Cncv (Vt. Super. Ct. Feb. 8, 2017) and that the *Toensing* case now is on appeal before the Supreme Court, docketed as No. 2017-090. A review of the issues presented to the Supreme Court strongly suggests that its ruling will likely have a substantial effect on the issues of this case as far as Mr. Sorrell goes. However, the trial court decision in *Toensing* is not binding, the Supreme Court has not yet ruled, and no one has sought a stay pending its ruling.

Exhibit D

<https://vtdigger.org/2017/10/04/judge-sorrell-must-sit-deposition-public-records-case/#.WfDkrWhSyUk>

Judge: Sorrell must sit for deposition in public records case

By **Morgan True**

Oct 4 2017

BURLINGTON — Vermont’s former attorney general has been ordered to answer questions under oath about the possible existence of public records that the state says are confidential.

The legal decision Wednesday was a major victory for a nonprofit that is suing Vermont for records related to a probe of Exxon Mobil. The decision came hours after former Attorney General William Sorrell failed to show up for a scheduled deposition.

Washington County Superior Court Judge Mary Miles Teachout ruled against the Vermont Attorney General’s office, which is representing Sorrell. Teachout threw out the office’s motion to dismiss the case and another motion to quash a subpoena issued to Sorrell.

Teachout granted a motion from the nonprofit **Energy & Environment Legal Institute** to compel Sorrell to sit for a deposition. The case hinges on how far an exemption to the public records law known as attorney-client privilege can be extended and has serious implications for the public records law in Vermont.

The institute is seeking communications between the Vermont and New York attorneys general’s offices that date back to Sorrell’s tenure, when the two offices were jointly probing Exxon Mobil’s emissions accounting practices.

New York Attorney General Eric Schneiderman is investigating whether Exxon Mobil **overstated the value of its assets** and defrauded shareholders by not properly accounting for what carbon pollution might cost the company in the future.

Vermont’s current attorney general, TJ Donovan, said Vermont is no longer involved in that investigation, and his office is claiming the communications sought by Energy & Environment Legal Institute are protected by attorney-client privilege.

Matthew Hardin, a lawyer for Energy & Environment Legal Institute, said attorney-client privilege doesn’t apply in this case, because once records are shared beyond an attorney’s office — as these were shared with New York — they lose their privileged status.

But Donovan countered that confidentiality in such cases is essential for his office to look out for the interests of Vermonters.

The communication between the Vermont and New York attorneys general took place pursuant to a common interest agreement, an arrangement that's used to share information between jurisdictions, Donovan said.

"We have multiple common interest agreements with many other jurisdictions that allow us to engage in different actions that help us protect and promote the health and safety of Vermonters," Donovan said.

If communication through those agreements isn't privileged and confidential, it would severely limit the attorney general's ability to investigate potential wrongdoing and evaluate whether to take legal action, according to Donovan.

Hardin said the problem is that Donovan is applying the privilege too broadly in this case. "If I order a pizza, that's not a privileged communication just because I'm an attorney," he said.

Teachout is reviewing records the attorney general provided to the court, in order to decide whether they are privileged or must be turned over to E&E Legal. That decision could affect how the state can apply attorney-client privilege to public records requests in the future.

Further complicating matters, Hardin has claimed in a lawsuit that the records Teachout is reviewing may be incomplete, because they include only communications from Sorrell's official email account, and not a personal Gmail account he has used for state business in the past.

That's why Hardin is seeking to depose Sorrell. He wants to know what devices or accounts Sorrell used to create state records, where those records would be today, or if they were turned over with the other records related to the case.

Whether communications via public officials' private accounts are public records is the subject of a separate case before the Vermont Supreme Court, where the attorney general's office is again the defendant.

Teachout was clear that her ruling Wednesday sets aside the "substantive legal issues" raised by the attorney general, in order to allow the case to proceed.

The ruling was issued at 12:54 p.m., just hours after Sorrell skipped a deposition with Hardin, who had driven from Virginia to the civil court in Burlington to question the former attorney general.

"I'm ready to be deposed and answer questions honestly if and when it's the appropriate time to do so, but on the advice of counsel I didn't go today," Sorrell said before the ruling.



Hardin said Sorrell's decision to skip the deposition is part of a larger pattern of the attorney general's office flouting Vermont's rules for civil litigation and engaging in "delay tactics" and "attrition warfare."

"They told us twice that they were not going to come, and we said, 'Unless the judge gives you permission not to come, you're required to come,'" Hardin said.

Donovan, in an interview prior to the ruling, said his office did advise Sorrell not to show up, but disagreed with the notion that they're not following the rules for civil procedure.

“Our position is that the motion to dismiss has to be ruled upon before discovery can be undertaken,” Donovan said.

Hardin said his organization’s goal is to uncover evidence of what he describes as a “scandalous climate-RICO cabal,” using the acronym for the Racketeer Influenced and Corrupt Organizations Act, an anti-corruption law. Hardin alleges an abuse of prosecutorial powers to silence the free speech of Exxon Mobil or other entities that disagree with the attorney general’s view of how to price carbon. He pointed to think tanks and policy groups in other states that have been subpoenaed as part of the probe, as evidence that it is chilling speech.

“Whatever your feelings are on climate change, you shouldn’t fear criminal prosecution for disagreeing with an attorney general,” Hardin said. “Legitimate disagreements on the social cost of carbon are a political issue, or something for scientists to debate, not securities fraud or something to be decided in criminal court.”

Donovan declined to comment on the underlying investigation, saying Vermont is no longer involved.

Sorrell was dismissive of the underlying case and any value held by the information E&E Legal Institute is seeking to expose.

“This case is just one of a series of harassment cases being filed against attorneys general around the country by a bunch of climate change deniers,” he said. “My conscience is very clear, let’s put it that way.”

